SUPREME COURT

OF THE

UNITED STATES

NO. _____

PETITION FOR CERTIORARI

RICHARD D. LAMM,

Appellant,

vs.

JOHN S. VOLPE, et al.,

Appellees.

COUNSEL OF RECORD:
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SUPREME COURT

OF THE

UNITED STATES

NO. _____

RICHARD D. LAMM individually as a citizen and taxpayer of the State of Colorado and the United States, and as a duly elected representative of the House of Representatives of the State of Colorado, and on behalf of all those similarly situated,

Appellant,

vs.

JOHN S. VOLPE, Secretary of Transportation, JOHN N. MITCHELL, U. S. Attorney General, FRANK C. TURNER, Federal Highway Administrator,

Appellees.

APPEAL FROM THE UNITED STATES
COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI

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(I)

OPINIONS BELOW

The judgment of the District Court, Chilson, J., granting the Defendants' Motion to Dismiss and Motion for Summary Judgment is set forth in an oral opinion in the Record. (R. 11-13). The judgment of the Court of Appeals, Barret, J., affirming the judgment of the District Court, is set forth in Appendix I of this Petition.

(II)

JURISDICTION

(a)

Judgment by the United States Court of Appeals for the Tenth Circuit was entered on October 27, 1971.

private parties through the exercise of the police power without making such payments, does a state legislator have standing to sue, individually and on behalf of his fellow legislators and citizens of his state; to challenge the constitutionality of such Federal statute and the legality of such actions of Federal officials?

(B)

Where a Federal statute and the actions of Federal officials pursuant to such actions of private parties and make payments to such private parties for injury caused by such regulation, as conditions for the state to obtain a Federal grant of funds, though the state allegedly could comply with the other

conditions for obtaining such Federal grant by regulating the actions of such private parties through the exercise of the police power without making such payments, does a state taxpayer have standing to sue, individually and on behalf of his fellow state citizens, to challenge the constitutionality of such Federal statute and the legality of such actions of Federal officials which allegedly will cause his state taxes to increase?

(C)

Where a suit challenges the constitutionality of a Federal statute, and the legality of the actions of Federal officials pursuant to such statute, which require a state to regulate the actions of private parties and make pay-

ments to such private parties for injury caused by such regulation, as conditions for the state to obtain a Federal grant of funds, though the state allegedly could comply with the other conditions for obtaining such Federal grant by regulating the actions of such private parties through the exercise of the police power without making such payments, does such suit become moot when a state legislature enacts legislation appropriating funds to make such payments to private parties?

(IV)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which the case involves, which are set forth in Appendix I because the

provisions involved are lengthy, are:

(a) United States Constitution, Amendment X.

(b) Title 5, United States Code, section 702 (Supp. V).

(c) Title 23, United States Code, section 123 (1966; 1971 Supp.; May, 1971 supp.).

(V)

STATEMENT OF THE CASE

This case involves Title 23, United States Code, section 131, which regulates billboards alongside Federal-Aid Highways. The Highway Beautification Act of 1965 provides that if the Appellee Secretary of Transportation determines that any state has not provided for "effective control" of the erection and maintenance of outdoor advertising and billboards, alongside federal-aid interstate and primary highway systems, that state's Federal-

Aid Highway allotment will be reduced by 10%. 23 U.S.C. 131.(b). The Secretary of Transportation has the duty of setting certain standards, on a nationwide basis, with respect to the lighting, size, number, and spacing of signs and with setting standards of "customary use" which will allow outdoor advertising in areas adjacent to federal-aid interstate and primary highways which are "industrial or commercial" either as zoned or when meeting certain standards agreed upon between the Secretary and the individual state. 23 U.S.C. 131(d).

The act provides that "just compensation" shall be paid for the removal of all outdoor advertising. 23 U.S.C. 131(g). The Federal government is required to

pay 75% of such "just compensation", and the state is required to pay 25% of such costs. "Just compensation" includes compensation to the owner of the billboard for the taking of his "right, title, leasehold, and interest" in it. In addition, the property owner on whose land the sign is located must be "justly compensated" for the taking of his "right to erect and maintain" the billboard thereon.

A 1968 amendment to the Highway Beautification Act of 1965 provides that no outdoor advertising shall be required to be removed under the Act until the federal share of the "just compensation" to be paid is available. 23 U.S.C. § 131 (n).

However, the ability of state legislature to eliminate or reduce the number of billboards alongside federal-aid interstate and primary highways has been prevented by two factors. The first factor is that Congress did not appropriate any funds for the fiscal years 1968 and 1969 for payment by the Federal government under 23 U.S.C. 131(g) of its 75% share of "just compensation". Following the filing of this suit, Congress appropriated funds not to exceed $10,000,000 for the fiscal year ending June 30, 1970 and for the fiscal year ending June 30, 1971, to carry out 23 U.S.C. 131. P.L. 92-18, 92nd Cong., 1st Sess. (1971). Congress also appropriated funds not to exceed $10,000,000 for the fiscal year

ending June 30, 1972, to carry out 23 U.S.C. 131. P.L. 92-74, 92nd Cong., 1st Sess. (1971). The maximum amount appropriated is $30,000,000, to be apportioned among 50 states; however, appellant has alleged that the cost to the Federal Government of "just compensation" under 23 U.S.C. 131 in Colorado would be approximately $9,750,000 (Complaint, p.5 of Record on Appeal). Colorado's share of appropriated funds would be only $600,000 if these appropriated funds were equitably divided among all the states.

The second factor is an opinion issued by United States Attorney General Ramsey Clark in 1966 which discusses the "just compensation" provision of 23 U.S.C. 131(g) and states "that Section 131 is

to be read as requiring each state to afford their 25 percent share just compensation as a condition of avoiding the 10 percent reduction of subsection (b)." Letter from Ramsey Clark, United States Attorney General, to John T. Connor, Secretary of Commerce, Nov. 16, 1966. (Exhibit A to Complaint). Appellee John N. Mitchell, Attorney General of the United States, is the successor to the official duties of Ramsey Clark, and has responsibility for this letter, which advises the Appellees, Secretary of Transportation and Federal Highway Administrator, that compliance by the states with Title 23, United States Code, section 131(g) is mandatory and that the states should have their federal-aid highway

funds reduced by ten percent for failure to comply with Title 23, United States Code, section 131(g).

The Appellant, a member of the Colorado House of Representatives and the assistant minority leader of the House, has introduced bills in several sessions of the Colorado legislature providing for regulation of outdoor advertising and billboards alongside federal-aid highways in the State of Colorado by the police power, rather than by compensation as required by section 131 of Title 23. Plaintiff's Affidavit, R.

Appellant alleges that "these bills which he introduced were defeated partly because of the belief of members of the Colorado House of Representatives that

this would result in a 10% deduction of Colorado's share of federal-aid highway funds." id. Appellant has also alleged "that a majority of the Colorado House of Representatives would vote against similar bills in future sessions of the legislature because of a belief, that this would result in a 10% deduction of Colorado's share of federal-aid highway funds." id.

Appellant brought this suit challenging Title 23, United States Code, section 131, as unconstitutional on its face in violation of the Tenth Amendment of the United States Constitution. Appellant alleges that there is no federal or state constitutional provisions requiring payment of "just compensation"

under 23 U.S.C. 131; he alleges that the State of Colorado could insure compliance with the standards promulgated by the Secretary of Transportation under 23 U.S.C. 131(c),(d) by the police power, rather than by compensation. The appellant alleges that the Tenth Amendment only allows the federal government to impose a 10% reduction of federal-aid highway funds upon states where the state fails to comply with such standards, but does not allow the federal government to require the states to comply with these standards by compensation but not by the police power. He also alleges that even if the federal government has the power to require the states to use only compensation for controlling outdoor advertising

alongside federal-aid highways, the federal government cannot impose this requirement, and threaten the state government with a 10% reduction in federal-aid highway funds if the state controls outdoor advertising by use of the police power, where the federal government has failed to appropriate its 75% share of compensation funds.

As an alternative count of its complaint, the appellant alleges that 23 U.S.C. 131 should be declared to not require the states to control outdoor advertising by compensation, and not by the police power, where Congress has not appropriated the federal government's 75% share of compensation funds. Appellant asks the court to declare that the

interpretation of 23 U.S.C. 131 by Attorney General Ramsey Clark is invalid and contrary to 23 U.S.C. 131.

Appellant alleges that the Appellees Volpe and Turner intend to reduce federal-aid highway funds by ten percent to states that control or remove outdoor advertising and billboards by regulation or otherwise by the police power rather than by just compensation as required by 23 U.S.C. 131. The State of Colorado would allegedly have its federal-aid highway funds reduced by $6,000,000 if it failed to comply with 23 U.S.C. 131(g) by using the police power, rather than just compensation to remove billboards. The State of Colorado allegedly would have to pay $3,250,000 as its 25% share of

just compensation under 23 U.S.C. 131(g) to remove outdoor advertising and billboards from federal-aid highways; appellant alleged, however, that the State of Colorado could, consistent with the Constitution of the United States and of the State of Colorado, remove and control outdoor advertising and billboards alongside federal-aid highways by regulations, zoning ordinances, and other use of the police power, to the extent required by regulations of the Secretary of Transportation promulgated pursuant to 23 U.S.C. 131 (c),(d), without payment of just compensation.

The Appellant further alleges that 23 U.S.C. 131(n) (1968) prevents the State of Colorado from paying both the

federal and state share of just compensation under 23 U.S.C. 131(g) in order to remove outdoor advertising and billboards from federal-aid highways.

Appellant's allegations are to the effect that the State of Colorado consequently could not remove billboards and outdoor advertising from alongside federal-aid highways by either just compensation under 23 U.S.C. 131(g) or by use of the police power.

Appellant brought this suit as a class action on behalf of the members of the Colorado state legislature, and on behalf of state and municipal taxpayers of the United States.

The Appellees filed a Motion to Dismiss on the grounds that there was no

case or controversy, that the suit was barred by sovereign immunity, and that appellant did not have standing. The Appellees also filed a Motion for Summary Judgment. Following oral argument and the filing of affidavits by Appellees, the District Court, Chilson, J., granted Defendants' Motion to Dismiss and Motion for Summary Judgment.

Jurisdiction in the court of first instance, the United States District Court for the District of Colorado, was based upon Title 28, United States Code, Section 1331, and Title 5, United States Code, Section 702.

The Appellant appealed this decision to the United States Court of Appeals for the Tenth Circuit. Prior to the

issuance of opinion and entry of judgment by the Court of Appeals, the Colorado State Legislature passed legislation, Senate Bill No. 36 (June 2, 1971), that attempts to conform with the Federal Aid Highway Act by providing for the removal of billboards from alongside federal aid highways by payment of "just compensation" in accordance with 23 U.S.C. 131.

The Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court for the District of Colorado. The Court of Appeals held that the appellant did not have standing to sue, either as a legislator or taxpayer, and that the passage of Senate Bill No. 36 by the Colorado state legislature had made the case moot.

The appellant then petitioned this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Tenth Circuit.

(VI)

REASONS RELIED ON, FOR ALLOWANCE OF WRIT

(A)

STANDING OF APPELLANT TO SUE AS STATE LEGISLATOR

The first question raising the issue of the standing of the appellant to sue, individually and on behalf of his fellow legislators and citizens of his state, to challenge the constitutionality of a Federal statute and the legality of actions of Federal officials which allegedly will illegally cause the state to make substantial payments to private parties, appears to be one of first im-

pression for the courts of the United States. Counsel is aware of no cases in which this Court, other courts of the United States, or any courts of the states, have been presented with the issue of the standing of a state (or Federal) legislator to challenge the constitutionality of a state or Federal statute or the legality of actions of state or Federal officials.

Recently, in Data Processing Service v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), this Court set up a two-step requirement for standing to sue. The first requirement of standing is that the plaintiff satisfy the "case" or "controversy" requirement of Article III of

the Constitution by having the "personal stake and interest that impart the concrete adverseness required by Article III." Barlow v. Collins, 397 U.S. at 164. To satisfy this requirement, the plaintiff must allege "that the challenged action has caused ... injury in fact, economic or otherwise." Data Processing Service v. Camp, 397 U.S. at 152. The second requirement of standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question ... That interest, at times, may reflect 'aesthetic, conservational, and recreational,' as well as economic values."

Id. at 153-154.

The "case or controversy" limitation requires that there be adverse parties, Fidelity National Bank v. Swope, 274 U.S. 123, 134 (1927), with the dispute "presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968); Data Processing Service v. Camp, 397, U.S. 150, 151-152 (1970); see United Public Workers v. Mitchell, 330 U.S. 75, 86-94 (1947). A federal court may not grant advisory opinions which cannot affect the rights of the litigants before the court, St. Pierre v. U.S., 319 U.S. 41, 42 (1943), nor issue a decree upon a hypothetical threat or state of facts which may never

occur and which cannot presently be perceived. Electric Bond Co. v. S.E.C. 303 U.S. 419, 443 (1938); United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947).

This case presents an adversary context, not a hypothetical set of facts. Though the Secretary of Transportation has not acted pursuant to 23 U.S.C. 131 (c) to penalize the State of Colorado under 23 U.S.C. 131(b), the threat of such action by Appellees Volpe and Turner has allegedly been sufficient to force the Colorado State Legislature to enact legislation to comply with 23 U.S.C. 131, thus committing the State of Colorado to make payments to private parties which the appellant contends are unconstitutionally and illegally required by

Federal statute and Federal officials. The plaintiff and similarly situated Colorado state legislators have a sufficient personal stake in the outcome because they have suffered injury to their independence to vote as they believe best for their constituency and as required by their oath of office.

With respect to the issue of whether the interpretation of section 131 of Title 23 by the appellants is correct, the appellant is certainly within the zone of interests sought to be protected by section 131 of Title 23 -- the aesthetics of federal-aid highway corridors. Appellant, through the introduction of bills in past sessions of the Colorado House of Representatives to regulate and

remove billboards and through his article concerned with the controversy of this litigation, see R. Lamm & S. Yasinow, The Highway Beautification Act of 1965: A Case Study in Legislative Frustration, 46 Denver L. J. 437 (1969), has shown a concern with the aesthetics of federal-aid highways and removal of billboards alongside federal-aid highways sufficient to bring him within the zone of interests of section 131 of Title 23. Cf. Barlow v. Collins, 397 U.S. 159 (1971). The appellant has standing to sue with respect to this first issue under the Administrative Procedure Act, 5 U.S.C. 702, under which the rule of standing is that "a party must be considered 'aggrieved' if, by his conduct and activities,

he has demonstrated 'special interest' in the values recognized and protected by the relevant statute." Powelton Civic Home Owners Assn v. Department of Housing and Urban Development, 284 F. Supp. 809, 827 (E.D. Pa. 1968). See Data Processing Service v. Camp, 397 U.S. 150, 153-154 (1971); Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6 Cir. 1967), cert. denied 390 U.S. 921 (1968); Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2 Cir. 1965), cert. denied 384 U.S. 941 (1966); Crowther v. Seaberg, 312 F. Supp. 1205 (D. Colo. 1970); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp.

238, (M.D. Pa. 1970). Section 131, either as interpreted or on its face, is alleged to be an unconstitutional restriction of the police power of the state of Colorado, in violation of The Tenth Amendment of the United States Constitution. The appellant, as a state legislator, is within the zone of interests of the alleged constitutional guarantees of the Tenth Amendment, since the infringement of the police powers of the state of Colorado is an infringement on the police powers of the Colorado State legislature. Because plaintiff is a member of the state legislature and represents the state legislature, he is within the zone of interests of this alleged Tenth Amendment guarantee.

The appellant thus should have standing to assert all of the issues raised in the complaint. Cf. Baker v. Carr, 369 U.S. 186 (1962); Flast v. Cohen, 392 U.S. 83 (1968); Jenkins v. McKeithen, 395 U.S. 411 (1969); Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947).

If plaintiff does not have standing in this case, it is hard to imagine who would have standing to prosecute this case. Cf. Izaak Walton League v. St. Clair, 313 F. Supp. 1312, 1317 (D. Minn. 1970). Plaintiff "has been active for many years in urging...legislative action" and his interest in the question in controversy is "continuing, basic and deep." Id. at 1316, 1317. He therefore has an "aesthetic, conservational

and recreational interest to protect" and gives him "standing and meets the second requirement of Association of Data Processing." Id.

(B)

STANDING OF APPELLANT TO SUE AS A STATE TAXPAYER

The second question raises the issue of whether a state taxpayer has standing to sue in a suit challenging the constitutionality of a Federal statute, and the legality of actions of Federal public officials, where such Federal statute and actions of Federal officials allegedly will cause an increase in his state taxes. This issue appears to be one of first impression in this Court and the courts of the United States. This Court has considered the standing of federal

taxpayers to challenge federal legislation, Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923); and has recognized the standing of municipal and county taxpayers to challenge allegedly illegal expenditures by local and municipal governments. Doremus v. Board of Education, 342 U.S. 429, 433-435 (1952); Flast v. Cohen, 392 U.S. 83, 93 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923); Crampton v. Zabriskie, 101 U.S. 601, 609 (1879). The standing of state taxpayers to challenge allegedly illegal expenditures of state funds has been recognized by lower Federal courts. Fuller v. Volk, 351 F.2d 323 (3 Cir. 1965); Carlsbad Union School Dist. of San Diego County v. Rafferty,

300 F. Supp. 484 (S. D. Cal. 1969), aff'd 429 F.2d 337 (9 Cir. 1970). The general criterion for the recognition of the standing of municipal and state taxpayers is whether they sue to prevent the misuse of public funds in a good faith pocketbook action where he alleges actual monetary injury. Doremus v. Board of Education, 342 U.S. 429, 434 (1952); Fuller v. Volk, 351 F.2d 323 (3 Cir. 1965). The appellant, as a state taxpayer, satisfies this criterion, since the passage of Senate Bill No. 36 (June 2, 1971) by the Colorado State Legislature appropriates state funds and thus threatens direct monetary injury to appellant and similarly situated taxpayers of the State of Colorado.

Appellant, as a taxpayer and citizen of the State of Colorado, also satisfies the two criteria of standing established in Data Processing Service v. Camp, 397 U.S. 150 (1971). In Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238, 245 (M.D. Pa. 1970), the first criteria was found to be satisfied by individual citizens who used and enjoyed the area in question in a suit to enjoin the Secretary of Transportation from approving or granting Federal funds for a state secondary road project that allegedly would destroy the recreational and ecological values of a stream. In this case, the appellant and similarly situated citizens and taxpayers of the State of Colorado similarly will suffer

injury to their interests as "citizens, ... and environmentalists," cf. Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238, 245 (MD Pa. 1970), sufficient to establish the necessary personal stake in this litigation.

Individuals concerned with the protection of natural, scenic, and historic resources are within the zone of interests of statutes concerned with protection of these values, and meet the second requirement of standing. Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238, (M.D. Pa. 1970); see Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), aff'd 425 F. 2d 97 (2 Cir. 1970), cert. den.

- U.S. - (1971). The activities of the appellant as a state legislator and his article concerned with the controversy of this litigation, Lamm & Yasinow, supra, 46 Denver L. J. 437 (1969), show a concern with the aesthetics of federal-aid highways and removal of billboards alongside Federal aid highways sufficient to bring him with the zone of interests of 23 U.S.C. 131. Appellant is also allegedly within the zone of interests of the constitutional guarantees of the Tenth Amendment, since the infringement on the police powers of the State of Colorado allegedly is a denial of the rights of plaintiff and similarly situated citizens and taxpayers to the benefit of the full exercise of the police power by

the State of Colorado to regulate the safety and aesthetics of highways, and because the plaintiff has shown a special interest in the safety and aesthetics of highways through his past conduct and activities.

The allegations of appellant's complaint are sufficient to confer standing. Standing is concerned with the sufficiency of the plaintiff's allegations in his pleadings, not the legal sufficiency of his claim or the merits. Data Processing Service v. Camp, 397 U.S. 150, 152, 153, 156, 158 (1970).

(C)

MOOTNESS

The United States Court of Appeals for the Tenth Circuit held that the passage of Senate Bill No. 36 (June 2, 1971)

by the Colorado state legislature made this suit moot and thus deprived the Federal courts of jurisdiction. The Federal courts, including this court, are, of course, without jurisdiction to entertain suits which are moot. United States v. Alaska S.S. Co., 253 U.S. 113 (1970). But the Tenth Circuit Court of Appeals has decided this Federal question in a way in conflict with applicable decisions of this court.

Though Appellant agrees that if Appellee Volpe determines that this statute conforms with 23 U.S.C. 131, Colorado will not suffer a 10% reduction in its Federal aid highway funds, the passage of this statute by the legislature of the State of Colorado makes the con-

stitutional issues raised by Appellant ripe for judicial determination. The constitutional issues raised by Appellant are clearly not moot.

The fact that Colorado has enacted legislation to conform with 23 U.S.C. 131 makes this litigation ripe for judicial determination. The enactment of this Colorado statute coerced by affirmative, final agency action of Appellee Volpe through his letter to the Governor of Colorado, dated February 4, 1971, a copy of which is included in the Brief of Appellees filed with the Court of Appeals. R. . By this letter the Secretary of Transportation indicated his intention to strictly enforce the penalty provisions of 23 U.S.C. 131

against non-conforming states. Faced with this unequivocal, final expression of intent by Appellee Volpe, the legislature of the State of Colorado enacted conforming legislation. The enactment of this statute has committed the State of Colorado to pay 25% of the cost of just compensation to remove billboards from alongside federal aid highways in the State of Colorado. The total cost of such just compensation in the State of Colorado is approximately $13,000,000 (Complaint, p. 5 of Record on Appeal); Colorado will have to pay approximately $3,250,000 of such just compensation. This money will have to be paid by taxpayers of the State of Colorado, which includes Appellant.

Through this statute, Colorado has committed itself to paying $3,250,000 in just compensation pursuant to 23 U.S.C. 131. Unlike Eccles v. Peoples Bank of Lakewood, 333 U.S. 426 (1942), there are no contingent future events that must occur before the State of Colorado is committed to paying this share of just compensation under 23 U.S.C. 131. Actual pecuniary injury to the State of Colorado and its taxpayers (which includes Appellant) will thus "develop in the future". Sierra Club v. Hickel, 433 F. 2d 24 (9 Cir. 1970), cert. granted - U.S. - (1971). Unless Appellant can challenge the just compensation requirement of 23 U.S.C. 131 as in violation of the Tenth Amendment of the United States

Constitution prior to the payment to billboard owners by the State of Colorado of its share of "just compensation", this constitutional issue will become moot because Colorado will have paid its share of "just compensation" and will not be able to recover these payments from billboard owners or the Federal Government. Colorado would be estopped from raising this constitutional issue by the fact it had paid just compensation in compliance with 23 U.S.C. 131. If Colorado attempts to preserve this constitutional issue by refusing to pay its share of just compensation, its federal aid highway funds will be reduced by 10%--a sum of approximately $6,000,000. This $6,000,000 could not

be recovered, if Colorado eventually was successful in its constitutional challenge to 23 U.S.C. 131, once the annual appropriation of federal highway funds to the State of Colorado has lapsed after two years pursuant to 23 U.S.C. 118. Colorado would be unable to obtain final judicial determination of this constitutional issue prior to the lapse of the appropriation at the end of two years pursuant to 23 U.S.C. 118 and would thus irrevocably lose this $6,000,000.

The State of Colorado is thus in a similar position to that of CBS in CBS v. U.S., 316 U.S. 407 (1942), where this Court allowed CBS to challenge an F.C.C. regulation without having to

wait for a proceeding for violation of the regulation in question, since CBS was threatened with financial loss from local affiliate stations canceling contracts with CBS because of the existence of the regulation. Colorado, having been coerced by the existence of 23 U.S.C. 131 and by final agency action by Appellee Volpe into enacting a statute complying with 23 U.S.C. 131 which commits it to paying over 3 million dollars in "just compensation," is in a position similar to that of CBS. Colorado should not have to go through the administrative proceeding leading to 10% reduction of federal aid highway funds in order to raise the constitutional issues presented in this case. Cf. Village of Euclid

v. Ambler Realty Co., 272 U.S. 365, 386 (1926); Currin v. Wallace, 306 U.S. 1, 9 (1939); Evers v. Dwyer, 358 U.S. 202, 204 (1958); Epperson v. Arkansas, 393 U.S. 97, 101-102 (1968).

This litigation presents a justiciable case of controversy which is ripe for adjudication. Unless the constitutional issues are decided prior to the payment of just compensation by the State of Colorado, these issues will become moot. A challenge of 23 U.S.C. 131 as being unconstitutional on its face should not have to await administrative proceedings which would not involve this constitutional issue.

(VII)
CONCLUSION

For the reasons set forth in the above, it is respectfully submitted that this Court issue writ of certiorari; to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX I:
OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

October 27, 1971

RICHARD D. LAMM, individually and as a citizen and taxpayer of the State of Colorado and the United States and as a duly elected representative of the House of Representatives of the State of Colorado, and on behalf of all those similarly situated,

Plaintiff-Appellant,

v.

JOHN S. VOLPE, Secretary of Transportation, JOHN N. MITCHELL, U. S. Attorney General, and FRANK C. TURNER, Federal Highway Administrator,

Defendants-Appellees.

No. 71-1131

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

W. Allen Spurgeon, Assistant United States Attorney (argued), Denver, Colorado, (James L. Treece, United States Attorney, Denver, Colorado, with him on the brief), for appellees.

Richard D. Lamm (pro se), Denver, Colorado, (Howard B. Gelt, Denver, Colorado, with him on the brief) for appellants.

Before BREITENSTEIN, HILL and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Lamm, individually as a citizen and taxpayer of the State of Colorado and of the United States, and as a member of the Colorado Legislature, appeals from a summary judgment granted by the district court in favor of the defendants-appellees. Lamm seeks a declaratory judgment that 23 U.S.C. § 131 is an usurpation of the police power reserved to the State of Colorado in that it is violative of the Tenth Amendment of the United States Constitution. Lamm brings this class action against John S. Volpe, Secretary of Transportation, John N. Mitchell, U. S. Attorney General, and Frank C. Turner, Federal Highway Administrator. Lamm contends on appeal that: (1) there is a case or controversy involved; (2)

this is not an unconsented suit against the United States; and (3) he has standing to sue.

Section 131 is a part of the 1965 Highway Beautification Act which regulates outdoor advertising along federal-aid highways. It provides that if the Secretary of Transportation decides that any state has not provided "effective control" of outdoor advertising along federal-aid highway systems that the Federal-Aid Highway allotment to that state will be reduced by 10%. 23 U.S.C. § 131(b). Just compensation must be paid for the removal of outdoor advertising. 23 U.S.C. § 131(g). The Federal Government is to provide 75% of the compensation and the states are to con-

tribute 25%. If federal highway funds were to be reduced 10% in Colorado it would amount to $6 million per year.

Lamm contends that Colorado's Legislature has been prevented from eliminating billboards along the highways because Congress has failed to appropriate its share of compensation and because Attorney General Clark interpreted the "just compensation" provision to mean that every state must contribute 25% or have their federal highway funds reduced by 10%. Compliance with Section 131 is mandatory on the states.

Lamm has introduced several bills in the Colorado Legislature which he believes would provide effective control of outdoor advertising through exercise

of the state police power in lieu of just compensation. Although he does not specifically identify to the police power relied upon, we assume here that his bills declared outdoor advertising adjacent to certain highways a public nuisance, subject to destruction or abatement as injurious to public safety. We recognize that police power is a matter of legislative prerogative. In this field the legislature has wide discretionary powers. It includes everything essential to public safety, health, and morals. Cottrell Clothing Company v. Teets, 139 Colo. 558, 342 P.2d 1016 (1959). Police power should not be confused with eminent domain, in that the former controls the use of property by

the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed. C. B. & Q. Railway v. Drainage Comm'rs., 200 U.S. 561 (1906); Appeal of White, 287 Pa. 259, 134 A. 409 (1926); Annot., 53 A.L.R. 1215 (1928).

Here the power of regulation has not been pre-empted by the Congress. But that begs the point. The Congress has clearly determined that the "taking" of outdoor advertisements adjacent to federal-aid highways required "just compensation". The Tenth Amend-

ment 1/ has been construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." United States v. Darby, 312 U.S. 100, 124 (1941). And while the United States is "not concerned with, and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." Oklahoma

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1/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

v. Civil Service Comm'n., 330 U.S. 127, 143 (1947). That case involved a constitutional challenge by the State of Oklahoma under the Tenth Amendment to the authority of the United States Civil Service Commission to require the withholding of a certain share of Oklahoma's federal highway funds by reason of the State's violation of terms of the Hatch Act. The Court recognized that Oklahoma had a legal right to receive federal highway funds, subject to the condition that the limitation on the right to receive the funds complied with the Constitution and the congressional enactments. The Court held that Congress has power to fix the conditions for review of administrative orders. Judicial

cognizance was exclusively provided on review of the orders of the Civil Service Commission. See also American Power Co. v. S.E.C., 325 U.S. 385 (1945).

The Highway Beautification Act provides that no federal aid highway funds shall be withheld by the Secretary of Transportation until the state involved is provided an opportunity for a hearing. Appellate review of any order entered by the Secretary is accorded to an aggrieved states. 23 U.S.C. § 131(1). The District Court granted appellees' Motion for Summary Judgment. The Court held that (1) the case was not then justiciable in that the State of Colorado was not deprived of any funds; and (2) the appellant, Lamm, was without

standing to bring the action.

There are no statutes authorizing direct suits against the United States or federal officers governing the subject matter involved here. The Congress has, however, provided an administrative remedy available only to an aggrieved state from any decision of the Secretary of Transportation to withhold federal highway funds. 23 U.S.C. § 131(1). Under that same statute, it is provided that any funds so withheld must remain available for apportionment to the state in accordance with a final judgment following opportunity for judicial review if sought by a state. It is not necessary here to determine whether the administrative remedy made available

to an aggrieved state is exclusive. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). It is important to note, however, that Congress recognized only an aggrieved state as the party entitled to the opportunity for a hearing and the prescribed judicial review.

Lamm filed this action individually as a citizen and taxpayer of Colorado and of the United States, as an elected representative of the House of Representatives, and on behalf of those similarly situated. He has no standing individually as a citizen. He cites no case in which the United States Supreme Court has entertained an action brought to vindicate the public interest by a citizen having no legal interest of his

own. He presents no authority to bring a class action. The "taxpayer" theory of standing is the only contention we deem worthy of consideration.

The cases cited in appellant's brief as authorities supporting taxpayer standing are without merit. In Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970) no contention of standing under the "taxpayer" theory was advanced. In Doremus v. Board of Education, 342 U.S. 429 (1952), the Court rejected the taxpayer's standing claim. There the Court noted that taxpayer actions to prevent misuse of public funds have been upheld on state and municipal levels but denied on the federal level when the challenge is directed exclusively

to the taxing and spending power of the Congress.

In Frothingham v. Mellon, 262 U.S. 447 (1923), the taxpayer attacked a federal spending program under the Maternity Act of 1921 as violative of powers reserved to the states under the Tenth Amendment. The Court found that she lacked standing because she had not alleged a congressional breach of a specific constitutional limitation upon its taxing and spending power.

In Flast v. Cohen, 392 U.S. 83 (1968), the Court found taxpayer standing. There the taxpayers challenged federal expenditures to finance instructions in and purchase of textbooks for use in religious schools. The Court held

that where the federal taxpayer can establish a "nexus" between his status and a constitutional limitation imposed upon the taxing and spending power of the Congress (there the Establishment Clause of the First Amendment), he has standing. Significantly, however, the Court, in distinguishing Flast from Frothingham noted that:

> ". . . The allegations of the taxpayer in Frothingham v. Mellon, supra, were quite different from those made in this case, and the result in Frothingham is consistent with the test of taxpayer standing announced today. The taxpayer in Frothingham attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing

> and spending power. The taxpayer in Frothingham alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment." 392 U.S. 83 at 104-105."

Following oral arguments, Lamm submitted "traditional cases" in further support of his standing contention. He cited Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970); Protestants and Other Americans United for Separation of Church and State v. Watson, 407 F.2d 1264 (D.C. Cir. 1968); Data Processing Service v. Camp, 397 U.S. 150 (1970 and Abington School Dist. v. Schempp, 374 U.S. 203 (1963). These decisions do not aid to Lamm. In each case the challenge

to the taxing and spending power was anchored to an alleged constitutional provision restricting its exercise. The Tenth Amendment does not raise the challenge. Here Lamm relies upon the same standing contention rejected in Frothingham, supra. Finding lack of standing, we need not reach the sovereign immunity issue.

We further hold that this case has been rendered moot by reason of enactment by the Colorado Legislature of a just compensation statute in compliance with Section 131 of the Federal Act. The appeal became moot by reason of passage and gubernatorial approval of Senate Bill No. 36 on June 2, 1971. United States v. Alaska S.S. Co., 253 U.S. 113

(1920); Maritime Service Committee, Inc. v. International Organization of Masters, Mates and Pilots, AFL-CIO, 394 F.2d 160 (3rd Cir. 1968); Moran v. Carswell, 384 F.2d 720 (5th Cir. 1967); Boggess v. Berry Corporation, 233 F.2d 389 (9th Cir. 1956). We are not required to reach the merits as to any points on appeal raised by Lamm because the case has been rendered moot. Brownlow v. Schwartz, 261 U.S. 216 (1923); Heitmuller v. Stokes, 256 U.S. 359 (1921); Howard v. Wilbur, 166 F.2d 884 (6th Cir. 1948).

WE AFFIRM.

APPENDIX II:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment X, provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 5, United States Code, section 702 (Supp. V) provides:

> "Any person suffering legal wrong or any person adversely affected or aggrieved within the meaning of a relevant statute by agency action may seek judicial review thereof."

Title 23, United States Code, section 123 (1966; 1971 supp.; May, 1971 supp.)

> (a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Inter-State

System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this

subsection to a State.

(c) Effective control means that after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to (1) directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs,

displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county or local zoning authority has made a determination of customary use such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices --

(1) those lawfully in existence on the date of enactment of this subsection.

(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968; and

(3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit informational directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such Agreement. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt

any State from controlling outdoor advertising as otherwise provided in this section.

(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order

setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment

and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973.

The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.